STATE OF MICHIGAN

COURT OF APPEALS

TERRANCE JON TOP,

Plaintiff-Appellant,

v

JULIA MARIE SILVER, f/k/a JULIA MARIE TOP,

Defendant-Appellee.

UNPUBLISHED
January 25, 2005

No. 250275
Allegan Circuit Court
LC No. 89-011830-DM

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Appellant appeals by leave granted the trial court's July 22, 2003 order clarifying and modifying appellant's obligation to cover the college tuition expenses for the parties' two daughters. We affirm.

The parties were divorced in 1990. As part of a divorce judgment to which the parties agreed, appellee retained custody of the parties' two then minor daughters, while appellant retained visitation rights and support obligations. The support obligations included a provision requiring appellant to provide four years of college tuition for each of the parties' minor daughters who attends college. The tuition support provision only limited this obligation by requiring the child to attend a nationally accredited college or university and maintain at least a 2.0 grade point average. Twelve years after the parties' divorce, the parties' eldest daughter began attending Indiana University and eventually incurred over $14,000 in nonresident tuition expenses during her first year. As a result of the closing of his business, appellant maintained that he could not afford to pay these expenses. Appellee filed a motion to enforce the child support obligation[1] and appellant requested a modification of the tuition provision based on his changed circumstances.

The trial court ordered appellant to pay the tuition obligations already incurred by his eldest daughter, but limited his future tuition obligations to cover resident tuition at one of Michigan's public colleges or universities, or should either daughter choose to attend a private

[1] Appellant has not contested the trial court's ruling that the tuition obligation is child support.

college within Michigan, or an out-of-state public or private college or university, appellant's tuition obligation was limited to the highest tuition then charged by the University of Michigan at Ann Arbor. The court ordered appellant to pay $20 per week on his arrearages and structured the remaining tuition obligations on the model of ordinary child-support obligations.[2] Appellee stipulated to the limitation on appellant's support obligation and to basing appellant's actual payments on his ability to pay.

Appellant first contends that the trial court erred when it based a deviation from the child support formula on appellee's reliance upon the consent judgment. We disagree.

A trial court may modify a child support order if modification is justified by changed circumstances. *Nellis v Nellis*, 211 Mich App 226, 229; 535 NW2d 240 (1995). This Court reviews a trial court's decision to modify a child support order for an abuse of discretion. *Id.* A court's factual findings are reviewed for clear error, but the court's ultimate disposition is reviewed de novo. *Id.* The burden is on the party appealing a child support order to show that the trial court clearly abused its discretion. *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999).

"Support" is any "payment . . . for a child or spouse" and "may include . . . payment of . . . educational expenses." MCL 552.602(ee). "When agreed to by the parties, the provision for a determination by the court of an amount to be paid for educational expenses, even though this would extend support beyond the child's minority, is a valid exercise of the court's discretion . . ." *Gibson v Gibson*, 110 Mich App 666, 671; 313 NW2d 179 (1981).[3] In this case, what appellant agreed to was not a future determination by the court concerning educational support, but rather was his own obligation, conditioned only upon the daughters' attending accredited colleges and maintaining grade point averages of at least a 2.0, and restricted in financial scope only by what the institutions involved happened to charge. The extent of the court's participation, then, beyond entering a consent judgment with that provision in the first instance, was invoking its equitable powers to *limit* for the first time appellant's potential financial burdens in the matter.

In Michigan, an order for child support must be determined by application of the child support formula. MCL 552.605(2). However, the court may enter an order that deviates from that formula, if the parties agreed to the deviation, so long as all of the requirements of subsection 2 are met. MCL 552.605(3). Subsection 2 requires the trial court to (1) state the amount determined by the formula, (2) how the order deviates from the formula, (3) the value of

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[2] Appellant's monthly support obligation was set at $610. Of that sum, $391 was for the support of appellant's youngest daughter by appellee and the remainder was for the current higher education support of appellant's oldest daughter.

[3] In addition, a provision in a judgment of divorce providing for the support of a child, after reaching 18 years of age, is valid and enforceable if, "the provision is contained in the judgment . . . by agreement of the parties as stated in the judgment." MCL 552.605b(4)(a). The original judgment of divorce was prepared and signed by appellant's counsel, and approved by appellee's counsel.

property or other support awarded instead of the payment of child support, if applicable, and (4) the reasons why application of the formula would be unjust or inappropriate in the case. MCL 552.605(2)(a)-(d). Appellant does not argue that the trial court failed to meet the first three requirements, and we decline to review them. Appellant does, however, argue that the trial court erred when it considered appellee's reliance upon the settlement agreement as a reason to depart from the formula.

Whether a trial court operating within the statutory framework of MCL 552.605 has adequately stated a reason to depart from the child support formula is a question of law reviewed de novo. *Burba v Burba (After Remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000).[4] In *Burba*, our Supreme Court looked to the language of the statute governing the child support formula and determined that, because the child support formula already incorporated the disparity of income between the parties, disparity of income could not be a proper basis for deviating from the child support formula. *Id.* at 648-649. After examining this same language, we see nothing that would preclude a trial court from considering detrimental reliance upon a consent judgment when determining whether a deviation from the child support formula is appropriate. Appellant voluntarily committed himself to the obligation to pay higher education expenses for his two daughters, and his daughters could rightfully rely on that commitment. The complete failure to enforce that obligation now, after appellant had twelve years to plan or petition the court based on changed circumstances, would be unjust and inappropriate. Therefore, the trial court did not err when it deviated form the child support formula on this basis.

Appellant next contends that the trial court erred by establishing both a gross sum obligation and a monthly obligation based upon the child support formula, and by failing to take into consideration appellant's ability to pay. We disagree.

Appellant cites *Nellis* for the proposition that a trial court cannot both use the child support formula to set a monthly support payment and deviate from that formula by requiring a lump sum support payment. *Nellis, supra* at 232. *Nellis* involved a child support obligation calculated according to the formula, but modified by requiring the payment of an upfront lump sum payment. *Id.* at 231. *Nellis* did not involve a resort to the child support formula to ascertain the increments by which a party was obliged to make payments on an obligation to which the party had agreed in a consent judgment. Therefore, we find *Nellis* inapplicable to the present facts. Finally, in this case, the trial court resorted to the child support formula in order to create a payment schedule that was within appellant's ability to pay, rather than ordering appellant to pay the full amount of the obligations he agreed to assume as they become due. Far from an abuse of

[4] In *Burba*, the Supreme Court cites MCL 552.17 as the applicable statute. *Burba, supra* at 647. However, the applicable statute, with identical language in the relevant parts, is now located at MCL 552.605.

discretion, the trial court fashioned a remedy that carefully balanced appellant's agreement to provide his daughters with a higher education against his changed financial circumstances.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Richard A. Bandstra